U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: April 5, 1989
CASE NO. 87-INA-739

IN THE MATTER OF:
CARRIAGE HOUSE REALTORS,
Employer,

on behalf of,
TSION CHERNET,
Alien.

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, Guill, Schoenfeld, Tureck and Williams Administrative Law Judges.

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

We are asked to review the decision of the Certifying Officer which denied Employer's application for alien labor certification on the grounds that Employer failed to specify lawful job-related reasons for rejecting U.S. applicants.

We affirm the decision of the Certifying Officer and deny Employer's application for labor certification. Employer's undocumented assertion that applicants could not understand his heavily accented English is insufficient to meet its burden of proving that it rejected U.S. applicants for lawful job-related reasons.

The Facts

Employer, Carriage House Realtors, filed an application on March 3, 1986 on behalf of Alien, Tsion Chernet, for the position of Secretary (AF31). The position initially required two years experience in the job offered, the ability to type 50 words per minute, and fluency in Amharic (AF31).

On October 14, 1986 the Certifying Officer issued a Notice of Findings ("NOF") (AF21-24). The NOF determined that the foreign language requirement had not been justified as a business necessity as required by Section 656.21(b)(2) (AF23). On February 23, 1987, in response to the NOF, Employer deleted the language requirement (AF 20) and readvertised the position (AF 41).

Employer received nineteen responses to the newspaper advertisement (AF 42-98). On January 28, 1987, Employer submitted a statement of rebuttal to the NOF which enumerated why all nineteen applicants had been rejected. (AF13-15). Employer stated that two of the applicants failed to respond to its attempts to reach them, six did not meet the minimum requirements, three were not interested in the position, and eight could not understand the heavily accented English of its owner so no interview could be conducted. Employer did not conduct any personal interviews; rather, all contact with applicants was conducted by mail or telephone. (AF14-15).

On February 27, 1987, the Certifying Officer issued a second Notice of Findings (AF 10-12), in which he found that Employer had not shown that three of the applicants whom he identified by name, were rejected for lawful job-related reasons. Employer's rebuttal asserted that all three of the applicants identified by the CO were contacted by telephone in regard to the job opportunity. The owner further stated that one applicant so contacted could not understand his questions and did not wish to come for an interview and that the other two also could not understand his foreign accent, so "no proper interview could be conducte" and the position was not offered to them. These three applicants responded to questionnaires sent to them by the Department of Labor (AF 26-29). One applicant confirmed that she received two telephone calls and had great difficulty in understanding the party calling her. However, she also stated that she

did not report for an interview because no interview was set up. The two remaining applicants stated that they were never contacted by Employer.

The Certifying Officer stated in the second NOF that "[a]lthough the Employer has deleted a foreign language requirement, he is using the excuse that his accented English has resulted in disqualification of U.S. workers." The C.O. further stated that Employer must show how the U.S. applicants could not perform the job duties and asked for documentation of specific job-related reasons for rejection of the U.S. workers.

On April 2, 1987, Employer submitted a statement by its owner in rebuttal to the second NOF in which he argued that although he has a excellent command of the English language, he does have a heavy foreign accent that often makes it difficult for people to understand him and that he has therefore rejected the three applicants in question for job-related reasons (AF 7-9). Employer also stated that it attempted to recontact all three applicants after receiving the second NOF. The applicant to whom the owner had admittedly spoken on two occasions prior to the issuance of the NOF, did not respond to a message left with her roommate. In regard to the two applicants who stated that they were never contacted, Employer asserted that its "notes reflect" that phone discussions had been held with each. The owner did make contact with both of these applicants again and, after conversations "at some length, explaining the type of secretarial work required in a real estate office, particularly the heavy client contact both by telephone and in person," both applicants declined a personal interview because "they were not interested in the job."

On May 27, 1987, the Certifying Officer issued a Final Determination denying the application for labor certification for the alien named therein because Employer failed to rebut or correct the violations set forth in the NOF (AF 5-6).

Discussion

In the NOF, Employer was asked to show how the U.S. applicants could not perform the requisite job duties and submit convincing documentation of specific job-related reasons for rejection of the U.S. workers. Two regulations address this issue. Title 20 C.F.R. §656.21(b)(7) states that an employer is required to document that U.S. workers were rejected solely for lawful job-related reasons. Section 656.21(j)(1)(iv) states that an employer is required to explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

We find that Employer has failed to document that U.S. workers were rejected solely for lawful job-related reasons on two grounds. First, we find that Employer has failed adequately to substantiate its claim that it had in fact contacted the two applicants who signed questionnaires indicating that they were never contacted in regard to their applications and that it has also failed to substantiate that the third applicant had declined an interview where her signed questionnaire stated that she was not offered an interview. This Board has rejected the notion that when an employer's response differs from a job applicant's response, the weight of the evidence is to be

automatically afforded the applicant. In re Cathay Carpet Mills, Inc., 87-INA-161 (December 7, 1988) (en banc); In re Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc). In this case we find that Employer has failed to substantiate its claims concerning its actions, or lack of action, in regard to these applicants. In its rebuttal argument, Employer refers to notes it claims show that telephone conversations were had with both applicants who stated they were never contacted. Employer failed to offer these notes or any other documentation to support its position. The fact that two applicants reported that they were never contacted at all strikes us as more than mere coincidence and lessens the probability that the failure to contact an applicant was mere accident or oversight. Under these circumstances, without further substantiation from Employer, we find the signed questionnaires from the applicants to be more persuasive.

Second, assuming that Employer had timely contacted these applicants, we find that it rejected two applicants for reasons that are not lawfully job-related. Employer argues that two U.S. workers were rejected on the grounds that they could not understand the owner's heavily accented English and that this is a lawful job-related reason. In particular, Employer states in its brief that these applicants would be unable to take dictation, a basic secretarial skill, because of the owner's strong accent.

We do not accept Employer's argument that the rejected applicants would not be able to take dictation or communicate with the owner. The ability to understand the accented speech of a co-worker speaking english is, in our opinion, more in the nature of job orientation than a specific skill. Moreover, Employer reported that when two of the applicants were reached by telephone after the issuance of the NOF, the owner conducted a "lengthy" conversation explaining the complexities of the position. We find this statement inconsistent with the assertion that the applicants could not understand his accented speech. In reaching these factual findings we are mindful of Employer's having earlier withdrawn a foreign language requirement after having it challenged by the CO.

Finally, in contacting applicants after receipt of the NOF Employer attempted to cure violations by establishing that the applicants no longer were interested in the position.

An employer cannot, after reviewing the NOF, contact an applicant for the purpose of curing a defect in the recruitment of that applicant by showing that the applicant is no longer available for the job. In re Custom Card d/b/a/ Custom Plastic Card Co., 88-INA-212 (March 17, 1989) (en banc). Otherwise an employer could succeed in its labor certification application by the artifice of improperly rejecting a qualified U.S. worker, and then waiting for several months, until after the NOF is issued, to attempt to cure the defect by ascertaining that the U.S. worker is no longer available.

We thus conclude that Employer has failed to document that the rejections of U.S. workers were solely for lawful job-related reasons. It has failed to substantiate its claim that the three applicants in question were properly contacted and offered an opportunity to interview for the position and has further failed to establish that the inability to understand the owner's strong

accent over the telephone is a lawful job-related reason for rejecting them. Accordingly, the request for alien labor certification was properly denied.

ORDER

The determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/MKG/mc